arising out of resolution to be applied retroactively to the date of the complaint.[559] BSPA asserts that vertically integrated programmers covered by the program access rules have incentives to use temporary foreclosure strategies during negotiations for programming and, therefore, standstill agreements should be made part of the program access complaint procedures.[560] Other parties favoring a standstill provision include ACA, EchoStar, and SureWest.[561] EchoStar asserts that there can be no doubt that the Commission has the authority to promulgate a standstill requirement as a lesser interim remedy where interruption of carriage threatens to cause irreparable injury to the public.[562]

136. NCTA opposes any "standstill" provision and states that there is no authority that allows the Commission to interfere in the right to contract in this way.[563] Time Warner asserts that the standstill requirement would prohibit a network from de-authorizing carriage by an MVPD, but would allow the MVPD to drop the network, creating an unfair bargaining situation.[564] Time Warner believes that any standstill requirement would increase the likelihood of program access complaints because the MVPD will have a strong incentive to file a complaint just to protect the *status quo* and decrease the chances that parties will resolve their disputes because the incentive of either party to negotiate could be reduced once the *status quo* is protected.[565] Comcast and the Broadcast Networks also oppose any "standstill" requirement.[566]

137. We agree that the threat of temporary foreclosure pending resolution of a complaint may impair settlement negotiations and may discourage parties from filing legitimate complaints.[567] We request comment on whether the issuance of temporary stay orders would encourage parties to resolve program access disputes and to make use of the Commission's complaint procedures when needed. We request comment on whether complainants must formally request such relief from the Commission and must establish that they are likely to prevail on the merits of their complaint; will suffer irreparable harm absent a stay; that the balance of harms to the parties favors grant of a stay; and that the public interest favors grant of the stay.[568] We request comment on whether, as part of a showing of irreparable harm,

[559] *See* BSPA Comments at 14-15; RCN Comments at 19-20; USTelecom Comments at 27.

[560] *See* BSPA Comments at 15.

[561] *See* ACA Comments at 8; EchoStar Comments at 30; SureWest Comments at 10.

[562] *See* ACA Comments at 8; EchoStar Comments at 30; SureWest Comments at 10.

[563] *See* NCTA Reply Comments at 14.

[564] *See* Time Warner Reply Comments at 19.

[565] *See id.*

[566] *See* Broadcast Networks Reply Comments at 3; Comcast Reply Comments at 38.

[567] In the *Adelphia Order*, the Commission discussed circumstances wherein temporary foreclosure of programming service may be profitable even where permanent foreclosure is not. *See Adelphia Order*, 21 FCC Rcd at 8257-58, ¶ 121. By temporarily foreclosing supply of the programming to an MVPD competitor or by threatening to engage in temporary foreclosure, the integrated firm may improve its bargaining position so as to be able to extract a higher price from the MVPD competitor than it could have negotiated if it were a non-integrated programming supplier. *See id.* The Commission included, as a measure to alleviate such foreclosure strategies, a requirement that, upon receiving timely notice of an MVPD's intent to arbitrate, program carriage be continued under the existing terms and conditions. *See id.* at Appendix B, § B(2)(c); *see also Hughes Order*, 19 FCC Rcd at 544-48, ¶¶ 153-162 and 633, Appendix D.

[568] *See, e.g., Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Hispanic Information and Telecomm. Network, Inc.*, 20 FCC Rcd 5471, 5480, ¶ 26 (2005) (affirming Bureau's denial of request for stay on grounds applicant failed to establish four criteria demonstrating stay is warranted).

complainants may discuss the likelihood that subscribers would switch MVPDs to obtain the programming in dispute for a long enough period to make the strategy profitable to the respondent. We request comment on whether these stays should be routinely granted when the facts support their issuance and that they will help to encourage settlement negotiations. We request comment on the nature of the stay, that is, whether both the complainant and the respondent will be subject to the stay order, and required to fulfill their respective obligations under the terms and conditions of the carriage contract in issue, while the stay is in effect. We request comment on whether complainants will be permitted to drop the programming that is the subject of the program access dispute unless and until a request to dismiss the complaint with prejudice is granted by the Commission. We request comment on whether the length of the stay should be entirely discretionary. Finally, we request comment on whether the Commission should include, as part of its final order resolving the complaint or resolving damages, adjustments to its remedies that make the terms of the new agreement between the parties retroactive to the expiration date of the previous agreement.

V. PROCEDURAL MATTERS

A. Filing Requirements

138. *Ex Parte Rules.* The *Notice of Proposed Rulemaking* in this proceeding will be treated as "permit-but-disclose" subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Commission's rules.[569] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.[570] Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

139. *Comments and Reply Comments.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[571]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov,

[569] *See* 47 C.F.R. § 1.1206(b), as revised.

[570] *See id.* § 1.1206(b)(2).

[571] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

140. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

141. *Availability of Documents*. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-7365 (TTY), or bill.cline@fcc.gov. These documents also will be available from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554; they can also be reached by telephone, at (202) 488-5300 or (800) 378-3160; by e-mail at fcc@bcpiweb.com; or via their website at http://www.bcpiweb.com. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY).

142. *Information*. For additional information on this proceeding, contact Steven Broeckaert, Steven.Broeckaert@fcc.gov; David Konczal, David.Konczal@fcc.gov; or Katie Costello, Katie.Costello@fcc.gov; of the Media Bureau, Policy Division, (202) 418-2120.

B. Initial and Final Regulatory Flexibility Analysis

143. *Initial Regulatory Flexibility Analysis ("IRFA")*. The Regulatory Flexibility Act of 1980, as amended ("RFA"),[572] requires that a regulatory flexibility analysis be prepared for notice and

[572] The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[573] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[574] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[575] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[576] As required by the RFA,[577] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities of the proposals addressed in the *NPRM*. The IRFA is set forth in Appendix F.

144. *Final Regulatory Flexibility Analysis ("FRFA")*. As required by the RFA,[578] the Commission has prepared an FRFA relating to the *Report and Order*. The FRFA is set forth in Appendix G.

C. Paperwork Reduction Act Analysis

145. *Initial Paperwork Reduction Act Analysis*. The *NPRM* has been analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA"),[579] and contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the proposed information collection requirements contained in this Notice, as required by the PRA.

146. Written comments on the PRA proposed information collection requirements must be submitted by the public, the OMB, and other interested parties on or before 60 days after publication in the *Federal Register*. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002,[580] we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

[573] 5 U.S.C. § 605(b).

[574] *Id.* § 601(6).

[575] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." *Id.* § 601(3).

[576] 15 U.S.C. § 632.

[577] *See* 5 U.S.C. § 603.

[578] *See* 5 U.S.C. § 604.

[579] The Paperwork Reduction Act of 1995 ("PRA"), Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in Chapter 35 of title 44 U.S.C.).

[580] The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); *see* 44 U.S.C. 3506(c)(4).

147. In addition to filing comments with the Office of the Secretary, a copy of any comments on the proposed information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission, 445 12th St, S.W., Room 1-C823, Washington, D.C., 20554, or via the Internet at PRA@fcc.gov; and also to Jasmeet Seehra, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503, or via Internet to Jasmeet_K._Seehra@omb.eop.gov, or via fax at 202-395-5167.

148. *Further Information.* For additional information concerning the PRA proposed information collection requirements contained in this *NPRM*, contact Cathy Williams at 202-418-2918, or via the Internet at PRA@fcc.gov.

149. *Final Paperwork Reduction Act Analysis.* This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the OMB for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we will seek specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

150. We have assessed the effects of the new information collection requirements, and find that those requirements will benefit companies with fewer than 25 employees by facilitating the resolution of program access complaints and that these requirements will not burden those companies.

D. Congressional Review Act

151. *Congressional Review Act.* The Commission will send a copy of this *Report and Order and Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

VI. ORDERING CLAUSES

152. Accordingly, **IT IS ORDERED**, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 548, this *Report and Order and Notice of Proposed Rulemaking* **IS ADOPTED**.

153. **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 303(r), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 548, the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix D.

154. **IT IS FURTHER ORDERED** that (i) pursuant to 5 U.S.C. § 553(d)(3) and 47 C.F.R. § 1.427(b), the amendment to Section 76.1002(c)(6) and new Sections 76.1003(i) and 76.1003(k) **WILL BECOME EFFECTIVE** upon publication in the *Federal Register*;[581] and (ii) the amendment to Section

[581] *See* 5 U.S.C. § 553(d)(3) ("The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except ... as otherwise provided by the agency for good cause found and published with the rule."); *see also* 47 C.F.R. §§ 1.103(a), 1.427(b).

Section 76.1002(c)(6) provides that the exclusive contract prohibition set forth in Section 76.1002(c)(2) will expire on October 5, 2007. *See* 47 C.F.R. § 76.1002(c)(6). Accordingly, it is necessary for the five-year extension of this prohibition reflected in the amendment to Section 76.1002(c)(6) adopted herein to take effect by October 5, 2007. We thus find good cause to make the amendment to Section 76.1002(c)(6) effective upon publication in the *Federal Register*. We note further that this amendment extends an existing requirement and does not impose any new (continued....)

76.1003(e)(1) and new Section 76.1003(j) contain information collection requirements subject to the PRA and **WILL BECOME EFFECTIVE** upon approval by the Office of Management and Budget.[582]

155. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order and Notice of Proposed Rulemaking* including the Initial and Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

156. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this *Report and Order and Notice of Proposed Rulemaking* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

(Continued from previous page)
requirements on any entity. Accordingly, no entity will be harmed as a result of our decision to make this amendment effective upon publication in the *Federal Register*.

We also find good cause to make the amendments to our procedural rules adopted herein, other than those that require OMB approval, effective upon publication in the *Federal Register*. These rules are (i) new Section 76.1003(i), which allows parties to a program access dispute to voluntarily engage in ADR; and (ii) new Section 76.1003(k), which pertains to the Commission's authority to issue protective orders regarding confidential material submitted in program access complaint proceedings and to issue appropriate sanctions for violations of its protective orders. These new rules are essential to our goal of expeditiously resolving program access complaints. We find good cause to make these amendments effective upon publication in the *Federal Register* so that parties to all program access complaint proceedings, including those currently pending before the Commission, can benefit from these new rules. With respect to new Section 76.1003(i) regarding ADR, we note this procedure is voluntary and requires both parties to agree to engage in alternative dispute resolution; thus, no entity will be harmed as a result of our decision to make this amendment effective upon publication in the *Federal Register*. With respect to new Section 76.1003(k) regarding protective orders, we note that this rule enhances existing safeguards provided under our form protective order, and will facilitate and expedite the review of privileged and/or confidential documents; thus, no entity will be harmed as a result of our decision to make this amendment effective upon publication in the *Federal Register*.

[582] The Commission will publish a document in the *Federal Register* announcing the effective date of the amendment to Section 76.1003(e)(1) and new Section 76.1003(j).

APPENDIX A

List of Commenters

Comments filed in MB Docket No. 07-29

American Cable Association
AT&T Inc.
Broadband Service Providers Association
Cablevision Systems Corp.
Carol L. Carlson
Coalition for Competitive Access to Content
Comcast Corporation
DIRECTV, Inc.
EATEL Video, LLC
EchoStar Satellite L.L.C.
National Cable & Telecommunications Association
National Rural Telecommunications Cooperative
National Telecommunications Cooperative Association
Office of Advocacy of the United States Small Business Administration
Organization for the Promotion and Advancement of Small Telecommunications Companies and the Independent Telephone and Telecommunications Alliance (Joint Comments)
Qwest Communications International Inc.
RCN Telecom Services, Inc.
The Rural Independent Competitive Alliance
SureWest Communications
The United States Telecom Association
Verizon

Reply Comments filed in MB Docket No. 07-29

American Cable Association
AT&T Inc.
Cablevision Systems Corp.
Coalition for Competitive Access to Content
Comcast Corporation
Consumer Federation of America, Consumers Union, Free Press, Media Access Project, and Communications Workers of America (Joint Reply Comments)
DIRECTV, Inc.
EchoStar Satellite L.L.C.
National Cable & Telecommunications Association
Qwest Communications International Inc.
RCN Telecom Services, Inc.
SureWest Communications
Time Warner Inc.
Verizon
The Walt Disney Company, CBS Corporation, Fox Entertainment Group, and NBC Universal (Joint Reply Comments)

APPENDIX B

Response to Cablevision Regarding Analysis in *Adelphia Order*

1. This Appendix provides further details of the review of Cablevision's critique of the Commission's RSN analysis in Appendix D of the *Adelphia Order*.[1] In the *Adelphia Order*, the Commission conducted a statistical (regression) analysis that found, after holding other relevant factors constant, that non-cable MVPDs had significantly lower market shares in markets where they were denied access to a RSN.[2] The regression analysis was part of a larger "uniform price increase strategy" analysis, designed to assess the impact of changes in regional market shares for Comcast and Time Warner on their incentives to raise RSN prices. The resulting calculations indicate that in some markets the largest applicant would have an incentive to raise RSN prices by more than five percent. This result formed part of the rationale for imposing certain conditions on the Adelphia applicants.

2. One parameter needed for the uniform price increase strategy analysis is the amount by which subscribership to a competitive MVPD would fall if that MVPD were to choose not to carry the RSN. Cablevision asserts that "the analysis confuses harm to competitors with harm to consumers . . . . Importantly, it tells us nothing about the effects of exclusive RSN deals on consumer welfare."[3] Neither the regression analysis nor the larger uniform price increase strategy analysis in which it is embedded purport to provide a numerical estimate of the strategy's impact on consumer welfare. However, the results of the analysis inform the Commission's predictive judgment, based on the mode of analysis employed in the Department of Justice ("DOJ") Merger Guidelines, that withholding RSNs from rival MVPDs would reduce MVPD competition and harm customers. Therefore, we do not agree that the regression analysis tells us nothing about the effects of exclusive RSN deals on consumer welfare.

3. In order to assess Cablevision's critique of the regression analysis itself, it is necessary to describe the analysis briefly. Commission staff specified and estimated a model to explain DBS penetration (the actual dependent variable is the "alternative delivery system" penetration, from Nielsen Media Research) as a function of "cable prices, cable system characteristics, population demographics, and DBS program offerings."[4] The cable system data came from the 2005 FCC Cable Price Survey and the demographic data for the county within which each cable system in the sample is located came from the U.S. Census.

4. The regression equation contains dummy variables for the three markets, Philadelphia, San Diego, and Charlotte, in which local RSNs were not made available to DBS. The estimated coefficients on these dummy variables are negative in all three cases and statistically significant in the case of Philadelphia and San Diego. The magnitude of the coefficients indicates that in Philadelphia, DBS penetration is 40.5% lower than it would be if the local RSN were available to DBS. The corresponding figure for San Diego is 33.3%.

5. Most of Cablevision's criticisms of the regression model address the claimed omission of certain possibly relevant explanatory variables. However, some of the variables claimed to be left out

[1] *See* Cablevision Comments, Appendix B at 24-25.

[2] *See Adelphia Order*, 21 FCC Rcd at 8341-50, Appendix D.

[3] *See* Cablevision Comments, Appendix B at 24-25.

[4] *See Adelphia Order*, 21 FCC Rcd at 8344, Appendix D, ¶ 14.

were, in fact, included. Moreover, omission of an explanatory variable does not necessarily indicate that the coefficients on the relevant dummy variables are inaccurate or biased. In other words, the impact on DBS penetration of withholding an RSN could still be measured accurately, even if not every relevant explanatory variable were included in the regression. Nevertheless, after reviewing some specific Cablevision comments, we report on supplementary regression results that explicitly include variables that the Cablevision critique claims were inappropriately omitted.

6. As an initial matter, we examine some specific assertions made by Cablevision:

> "The analysis simply tests whether DBS penetration is different in Philadelphia, San Diego, and Charlotte than it is elsewhere, but not why it is different in those places.
>
> Results of the FCC analysis show that the control variables do not explain all of the differences between Philadelphia, San Diego, and the rest of the nation, but provides no reason to believe that the lack of access to an RSN is the key factor.
>
> Many variables likely to be important in explaining DBS penetration are omitted, such as the extent of local marketing of DBS, the quality of local DBS service, terrain and foliage coverage, and the extent and local marketing of cable, among others.
>
> ...the model should include some information about the number and quality of RSNs in an area...It is not possible to capture all the relevant information related to RSNs in a dichotomous variable indicating whether there is an exclusive RSN in a region. Moreover, the analysis should control for city or regional fixed effects, not include a few and claim that tests the effects of RSN access."[5]

7. In fact, the analysis is designed to hold constant other relevant determinants of variations in DBS penetration. If it does so, then the coefficients on the dummy variables for the three cities would capture the effect of RSN exclusivity. Moreover, the fact that the control variables do not explain all of the variation in DBS penetration does not mean that the coefficients on the dummy variables are biased. Additionally, omitted variables would affect the coefficients of the dummy variables only if they are correlated with any included variables, and Cablevision does not assert any such correlation.[6] Moreover, some of the variables Cablevision claims are omitted are actually included. The variable reflecting carriage of local broadcast signals is a prominent indicator of "the quality of local DBS service." Other than that, DBS channel lineups do not differ across markets. Furthermore, the latitude variable takes account, albeit indirectly, of terrain variations. The "look angle" for a satellite dish is greater at lower latitudes, which means that it takes a greater degree of terrain roughness to obscure the view of the satellite.

8. One consequence of differences across markets in the number and quality of RSNs is differences in demand for these networks. The Commission analysis does, in fact, control for systematic differences across markets in demand for RSNs via the "key DMA" variable, which takes on a value of one when the relevant cable system is in a DMA that is home to a professional sports team from one of the four major sports leagues. The presumption is that demand for RSNs is higher in these home markets

[5] *See* Cablevision Comments, Appendix B at 24-25.

[6] *See generally* Wooldridge, Jeffrey M. *Econometric Analysis of Cross Section and Panel Data* (Cambridge, MA: MIT Press) 2002 at 50-51, 61-70.

than in others. To the extent that the primary determinant of RSN demand and quality is availability of local professional teams from the major sports leagues, the key issues are whether there is a local team or teams, and whether the team or teams is available to DBS subscribers as well as cable subscribers. By and large, all RSNs (even in markets with more than one RSN splitting carriage of local major league teams) are available to DBS in markets outside the three specified. Although Cablevision provides no specific suggestion on how to characterize RSN "quality" more precisely, we attempt to account for it in the new regression results reported below.

9. Cablevision also asserts that "even if one believes the model is valid, the results on the Charlotte dummy variable contradict the FCC's interpretation."[7] In fact, the coefficient on the Charlotte dummy is negative, which is in accord with, rather than contradictory to, the hypothesis. However, the estimated coefficient does not meet standard benchmarks for statistical significance. The Charlotte RSN carried one relevant professional team and, as pointed out in the text of the *Adelphia Order*: "[T]he Charlotte Bobcats are a relatively new team and do not yet have a strong enough following to induce large numbers of subscribers to switch MVPDs."[8] Accordingly, this result may be one specific manifestation of the quality differences that Cablevision speaks of in general terms. Moreover, unlike many other cases, the Charlotte RSN was carried on the digital tier, which made it unusually expensive to acquire.[9]

10. Cablevision's suggestion that a full-blown "fixed effects" model would be appropriate is reasonable in principle.[10] However, Cablevision fails to note that, to estimate such a model, it would be necessary to have data for a time period or periods when the RSNs were made available to all MVPDs in addition to data for a time period or periods when the RSNs were withheld from rival MVPDs. Data for the former situation are not available, so it was not possible to estimate a full-blown "fixed effects" model. However, it is possible to estimate the *Adelphia Order* Appendix D model with some additional variables added.

11. The results reported below address Cablevision's claim that the regression equation reported in Appendix D of the *Adelphia* Order suffers from omitted variable bias, which could call into question the results of that regression. Our analysis indicates that this claim is unfounded. Indeed, adding the variables suggested by Cablevision to our previous regressions appears to strengthen the conclusions in Appendix D of the *Adelphia Order*. Our analysis indicates that Appendix D of the *Adelphia Order* may have been unduly conservative in its assessment of the reduction in DBS subscribership in DMAs in which DBS operators are denied RSNs.

12. Cablevision claims that we did not adjust for the quality of the RSN in our regression, instead treating all RSNs as equal. We know of no available direct measure of RSN quality, but we did, in fact, include a rough proxy for RSN quality: "key DMA," a dummy variable which equals one if there is a professional sports team in a given DMA, zero otherwise. This would adjust the regression if demand is different for multichannel video services in DMAs that contain professional sports teams. Nonetheless, in response to the critique we include in our analysis below an additional variable: a count of professional sports teams in each DMA, excluding National Football League teams, which generally do not appear on RSNs. Instead of just one or zero, this count ranges from zero to seven, and potentially could represent a

[7] *See* Cablevision Comments, Appendix B at 24-25.

[8] *Adelphia Order*, 21 FCC Rcd at 8271-72, ¶ 151.

[9] *See* http://www.nba.com/bobcats/news/release_cset_preview_041202.html

[10] *Adelphia Order*, 21 FCC Rcd at 8271-72, ¶ 151.

supply-side "potential quality" measure for RSNs. As shown in the results below, this variable does not alter our previous conclusions and, in fact, strengthens them.

13. Cablevision also claims that adjusting for the roughness of terrain will explain variations in DBS subscribership, and the lack of a variable measuring terrain biases our results. Again, we previously included a rough proxy for terrain, the natural log of latitude. Since DBS satellites are located over the southern United States, as latitude increases moving northward, DBS dishes must be pointed closer to the horizon. Presumably, the closer the dish is pointed to the horizon, the more likely terrain will interfere with the required clear view of DBS satellites. As expected, this variable in our previous regression shows a negative sign, although it was not statistically significant.[11] Nonetheless, we included several new variables that measure more directly the effect of terrain. First, we include the natural log of the standard deviation of the elevation in the county, which is a measure of roughness of terrain.[12] The log of latitude remains, and we also include an interactive variable between the log of standard deviation of elevation and the log of latitude, which will capture the combined effect of roughness of terrain and dish angle. Again, addition of these variables only strengthens the conclusions reached in the *Adelphia Order*.

14. As before, we follow Wise and Duwadi (2005) in the specification of a model to examine DBS penetration and the variables that affect it. The model estimates the impact of cable prices, cable system characteristics, population demographics, and DBS program offerings on the percent of television households subscribing to DBS service. Each observation in our data corresponds to an incumbent cable system responding to the 2005 FCC Cable Price Survey.[13] The survey provides information on the service rates and characteristics of the responding cable operators' cable systems. We use an estimate from Nielsen Media Research of the number of households subscribing to "alternative delivery systems" in a county to construct our measure of DBS penetration. Demographic variables are also available at the county level from the 2000 Census.

15. We use a partial log-linear functional form where the dependent and continuous independent variables are transformed using the natural logarithm.[14] We estimate variations of the following equation:

LN DBS PENETRATION = B_0 + B_1·LN CABLE PRICE + B_2·LN CABLE CHANNELS + B_3·PHILLY + B_4·SANDIEGO + B_5·CHARLOTTE + B_6· KEYDMA +B_7· TEAM COUNT (or KEYDMA) + B_8· DBSOVERAIR + B_9· CABLECOMP + B_{10}·HDTV + B_{11}·INTERNET + B_{12}·LN INCOME + B_{13}·LN MULTIDWELL + B_{14}·LN LATITUDE + B_{15}·LN STANDARD DEVIATION ELEVATION + B_{16}·LN STANDARD DEVIATION ELEVATION*LATITUDE + ε

[11] The model in the *Adelphia Order* was based on Andrew S. Wise and Kiran Duwadi, *Competition between Cable Television and Direct Broadcast Satellite: The Importance of Switching Costs and Regional Sports Networks*, 1 J. COMPETITION L. & ECON. 679 (2005) (Wise and Duwadi (2005)), which showed a negative and statistically significant log of latitude coefficient.

[12] The source of the added terrain variables is the SRTM Global Digital Elevation Model provided by ESRI, Inc., which is derived from the NASA/NGA Shuttle Radar Topography Mission (SRTM) from the U.S. Geological Survey's EROS Data Center. The resolution is 3 arc seconds (90 meters).

[13] We eliminate observations from cable systems that do not offer digital programming. Two more observations are lost when adding variables measuring terrain roughness discussed below.

[14] This transformation allows the coefficients on the continuous variables to be interpreted as elasticities.

Where:

LN DBS PENETRATION is the log of the percent of television households subscribing to an "alternative delivery system" in the county containing the responding cable system;

LN CABLE PRICE is the log of the recurring monthly charge for the basic tier plus the next additional package of channels offered by the responding cable system;[15]

LN CABLE CHANNELS is the log of the number of cable channels offered by the responding cable system on the basic tier plus the next additional package of channels;

PHILLY is an indicator variable taking on the value of 1 when the responding cable system is located in the Philadelphia DMA;

SANDIEGO is an indicator variable taking on the value of 1 when the responding cable system is located in the San Diego DMA;

CHARLOTTE is an indicator variable taking on the value of 1 when the responding cable system is located in the Charlotte DMA;

TEAM COUNT is a count of professional sports teams by DMA, excluding National Football League teams.

KEYDMA is an indicator variable taking on the value of 1 when the responding cable system is located in a DMA that is home to a professional sports team that is a member of Major League Baseball, the National Basketball Association, the National Football League, or the National Hockey League;

DBSOVERAIR is an indicator variable taking on the value of 1 when one or both DBS operators offer local broadcast signals in the DMA where the responding cable system is located;

CABLECOMP is an indicator variable taking on the value of 1 when the cable system competes against a second cable operator;

HDTV is an indicator variable taking on the value of 1 when the responding cable system offers one or more channels in high-definition format;

INTERNET is an indicator variable taking on the value of 1 when the responding cable system offers high-speed Internet access;

LN INCOME is the log of the median household income in the county containing the responding system;

LN MULTIDWELL is the log of the percent of households in multiple dwelling units ("MDUs") in the county containing the responding system;[16]

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[15] More than 90% of subscribers purchase at least the first two tiers of services. In addition, most regional sports networks are carried on one of these two tiers.

[16] We define a multiple dwelling unit as one that contains two or more housing units in one building.

LN LATITUDE is the log of the latitude of the county containing the responding system.

LN STANDARD DEVIATION ELEVATION is the log of the standard deviation of the elevation of the county containing the responding system; and

LN STANDARD DEVIATION ELEVATION*LATITUDE is an interaction variable between LN STANDARD DEVIATION ELEVATION and LN LATITUDE.

16. We use instrumental variables to account for possible endogeneity of the cable price and the number of cable channels. We use the natural logs of system capacity (MHz) and the number of subscribers served nationally by the cable system owner, as well as the number of networks with which the cable system owner is vertically integrated, as excluded instruments. We perform estimation using the generalized method of moments.

17. The first regression differs from the *Adelphia Order* only in adding TEAM COUNT.

Table 1

DBS Penetration and RSN Access

Independent Variables	**Dependent Variable: LN DBS PENETRATION**	
	Coefficient	**z-statistic**
LN CABLE PRICE	2.11*	2.15
LN CABLE CHANNELS	-1.11*	-2.61
PHILLY	-0.53*	-6.59
SANDIEGO	-0.47*	-5.52
CHARLOTTE	-0.21	-1.45
KEYDMA	0.21*	3.29
TEAM COUNT	-0.03	-1.94
DBSOVERAIR	-0.09	-1.43
CABLECOMP	0.27	1.18
HDTV	-0.12	-1.53
INTERNET	-0.06	-0.52
LN INCOME	-0.29*	-2.44
LN MULTIDWELL	-0.37*	-10.45
LN LATITUDE	-0.01	-0.03
CONSTANT	-0.73	-0.26
Observations	676	
Centered R-Squared	0.26	
F-Statistic (14, 661)	40.57	
Hansen J Statistic	27.22	

* - *significant at 95% confidence level*

Most coefficients change only slightly in terms of statistical significance or magnitude as compared to the results reported in Appendix D of the *Adelphia Order*. The magnitude of both PHILLY and SANDIEGO rise, and both are still highly statistically significant. CHARLOTTE drops slightly, but remains not statistically significant. In sum, the addition of TEAM COUNT only strengthens the approach taken in the *Adelphia Order*.

18. The second regression differs from the *Adelphia Order* by adding TEAM COUNT, LN STANDARD DEVIATION ELEVATION and LN STANDARD DEVIATION ELEVATION*LATITUDE. Thus, it addresses all of the omitted variable claims.

Table 2

DBS Penetration and RSN Access

Independent Variables	Dependent Variable: LN DBS PENETRATION Coefficient	z-statistic
LN CABLE PRICE	1.06	1.22
LN CABLE CHANNELS	-0.72*	-1.96
PHILLY	-0.51*	-6.59
SANDIEGO	-0.87*	-9.37
CHARLOTTE	-0.22	-1.64
KEYDMA	0.23*	4.13
TEAM COUNT	-0.04*	-3.03
DBSOVERAIR	-0.09	-1.59
CABLECOMP	0.04	0.18
HDTV	-0.11	-1.57
INTERNET	-0.02	-0.21
LN INCOME	-0.21	-1.89
LN MULTIDWELL	-0.39*	-11.53
LN LATITUDE	0.38	0.91
LN STANDARD DEVIATION ELEVATION	1.01*	2.59
LN STANDARD DEVIATION ELEVATION*LATITUDE	-0.25*	-2.31
CONSTANT	-1.08	-0.34
Observations	674	
Centered R-Squared	0.42	
F-Statistic (16, 657)	81.41	
Hansen J Statistic	30.65	

* - *significant at 95% confidence level*

This model also does not change the conclusions in the *Adelphia Order* and, if anything, strengthens them. The magnitude of the PHILLY and CHARLOTTE coefficients are virtually the same (although CHARLOTTE is closer to statistical significance), but the magnitude of SANDIEGO is more than double. This indicates that we may, in fact, have underestimated the effect of denial of RSNs on DBS subscribership.

19. *Conclusion.* In summary, while the added variables may add some precision and understanding to the dynamics behind DBS subscription, they do not alter the conclusions of our earlier analysis. The addition or subtraction of variables will yield different magnitudes for the coefficients measuring the effect on DBS penetration in areas in which DBS is unable to carry RSNs, but whatever the mix of variables, the negative effect on DBS penetration of RSN withholding remains clear. Adding variables to our equation, in response to suggestions made by Cablevision, actually appears to strengthen our results and confirms that the analytic approach in the *Adelphia Order* was a reasonable one.

APPENDIX C

Impact of Clustering on Withholding Strategy and Analysis of Profitability of Withholding Strategy

1. This appendix (i) examines changes in the magnitude of clustering since the *2002 Extension Order*; (ii) assesses the impact of clustering on the incentives of cable operators to withhold regional programming from rivals; and (iii) assesses the incentives of cable operators to withhold national programming from rivals. The analysis focuses on the two largest MSOs, Comcast and Time Warner, both of which are vertically integrated.

I. Data

2. The analysis draws on two sets of data from Warren Publishing ("Warren") pertaining to cable subscribership and homes passed, with each set designed as a census of all cable systems in the U.S. The first dataset contains data from January 2003, and the second dataset contains data from July 2007.[1] From each one, we extracted the data for all systems owned by Time Warner and by Comcast. Once the data for each cable operator were extracted, systems were sorted according to the respective cable operator, and then were sorted again by Designated Market Area (DMA). For each cable operator, we counted all of the subscriber and homes passed (HP) data for each DMA served. Each of these figures was entered into a spreadsheet showing the total number of homes passed and subscribers that each cable operator had in each DMA for each time period. A column was then added to each spreadsheet to provide the Nielsen television household (TVHH) count for each DMA for the relevant time period.

3. Since Warren generates its datasets through polling of each system, and because the responses are voluntary, each of the Warren datasets contained missing or incomplete information. At times, the subscriber data presented exceeded Nielsen TVHH counts, and more often, the HP data presented exceeded Nielsen's statistic for the number of TVHH in the DMA, or subscribers exceeded HP. In order to resolve these inconsistencies, we obtained datasets from another source for each of the two time periods examined. The additional data are from Centris, which uses random sampling to generate estimates of each MSO's ownership of cable subscribers in each DMA.[2]

4. The following describes the cases in which we attempted adjustments to the Warren data and the adjustments actually made.

Problem #1. Subscribers > Nielsen TVHH.[3] In these cases, where possible, we replaced the subscriber figure according to formula #1.

Problem #2. HP > Nielsen TVHH.[4] In these cases, where possible, we replaced the HP figure according to formula #2.

[1] Warren Publishing. *CABLE: General Information-January 2003*; Warren Publishing, *CABLE: General Information-July 2007.*

[2] CENTRISBridge. We preferred Warren as a primary data source because it is based on polling of, or at least an attempt to poll, all cable systems rather than sampling.

[3] Two cases: TW2007-49 Buffalo; Comcast2007-38 West Palm.

Problem #3. HP< Subs.[5] In these cases, where possible, we replaced the HP figure according to formula #2.

Problem #4. Subscriber data, HP data, or both were deemed insufficient because of lack of systems reporting in that DMA.[6] In these cases, where possible, we replaced the Warren subscriber statistic according to formula #1, and we replaced the HP figure according to formula #2.

The data adjustment formulas are as follows:

Formula #1. Subscribers = Centris-reported subscribers (16 cases)

Formula #2. HP = (Centris subscriber count for cable operator/Centris subscriber count for entire DMA)*Nielsen TVHH (79 cases).[7]

5. After making the modifications described, it became evident that some of these modifications had created new inconsistencies. We applied formula #1 or formula #2 as appropriate (6 cases).[8] This process left 12 cases that required additional attention, because there was not sufficient Centris data available to apply our adjustment formulas.

In four cases, we used an adaptation of Formula #2 as follows:

(Continued from previous page)

[4] Sixteen cases: TW2003-71 Honolulu, 161 Palm Springs, 192 Laredo; Comcast+AT&T2003-3 Chicago, 59 Richmond; TW2007-49 Buffalo, 58 Dayton, 72 Honolulu, 78 Rochester, 79 Syracuse, 157 Birmingham, 187 Laredo, 203 Zanesville; Comcast2007-11 Detroit, 18 Denver, 182 Charlottesville.

[5] TW2003-31 Milwaukee, 44 Buffalo, 51 Jacksonville, 78 Omaha, 80 Syracuse, 91 Burlington, 103 Greenville, 167 Utica, 173 Elmira, 199 Mankato; Comcast+AT&T2003-21 Pittsburgh, 32 Cincinnati, 35 Greenville, 39 West Palm, 50 Louisville,53 Wilkes Barre, 83 Huntsville, 87 South Bend, 107 Tallahassee, 169 Missoula; Comcast w/o AT&T2003- 35 Greenville, 50 Louisville, 83 Huntsville, 107 Tallhassee; TW2007-19 Orlando; Comcast2007-7Boston, 23 Portland, 25 Indianapolis, 38 West Palm, 48 Louisville, 61 Richmond, 64 Ft. Myers, 65 Charleston, 66 Flint, 84 Huntsville, 88 South Bend. 98 Johnstown, 148 Salisbury, 165 Hattiesburg, 181 Harrisonburg.

[6] Forty-one cases (six both, nine subs only, twenty-six HP only): Both Subs and HP missing: TW 2003-87 South Bend, TW2007-40 Birmingham, 44 Memphis, 109 Springfield, 132 Columbus,176 Watertown. Subs only missing: Comcast+AT&T2003-122 Macon, 127 Yakima; Comcast w/o AT&T2003-122 Macon; Comcast2007-74 Portland, 77 Spokane, 106 Ft. Wayne, 120 Eugene, 166 Clarksburg, 185 Meridian. HP only missing: TW2003-20 Orlando, 21 Pittsburgh, 60 Tulsa, 162 Gainesville; Comcast+AT&T2003-40 Birmingham, 118 Fargo, 119 Santa Barbara, 180 Bowling Green; Comcast w/o AT&T-17 Miami, 18 Denver, 53 Wilkes Barre, 59 Richmond, 111 Lansing, 119 Santa Barbara, 180 Bowling Green; TW2007-22 Pittsburgh, 35 Salt Lake, 38 West Palm, 110 Reno, 184 Greenwood; Comcast2007-40 Birmingham, 42 Norfolk, 51 Providence, 122 Obispo, 135 Monroe, 183 Bowling Green.

[7] Note that Formula #2 assumes that TVHH is a rough proxy for total HP. Based on nationwide homes passed figures, this is not an unreasonable assumption. *See infra* note 14. In DMAs where Time Warner or Comcast was identified as the only provider in that DMA, the figure is exactly equal to the number of Nielsen TVHH in that DMA. Where Time Warner or Comcast is a provider among two or more providers, we thus allocated HP according to their share of subscribers in that DMA.

[8] Six cases: Comcast+AT&T2003-122 Macon; Comcast w/o AT&T2003-17 Miami, 53 Wilkes Barre, 59 Richmond, 111 Lansing, 122 Macon;

Formula #3: HP = (Warren subscriber count for cable operator/Warren subscriber count for entire DMA)*Nielsen TVHH.[9]

6. Of the remaining cases, we eliminated seven from our dataset on the grounds that the presence of the MSO in question was apparently very small,[10] and we eliminated one case, even though the presence of the MSO in question was not small, because we did not have enough additional data to correct properly the apparent inconsistency in the data.[11]

II. Analysis of Increase in Clustering from 2002 to 2007

7. The above-described procedures have generated a set of data that reasonably represents the state of ownership of cable systems by Comcast and Time Warner as of January 2003[12] and July 2007. It is also important to note that the *2002 Extension Order* was adopted prior to Comcast's acquisition of AT&T Broadband. For this reason, the following results include separate calculations for Comcast with and without AT&T Broadband.

- For Comcast with AT&T Broadband, the share of homes passed in total television households increased in 61 markets, decreased in 57 markets, and remained the same in 90 markets.

- For Comcast without AT&T Broadband, the share of homes passed in total television households increased in 73 markets, decreased in 25 markets, and remained the same in 110 markets.[13]

- For Time Warner, the share of homes passed in total television households increased in 60 markets, decreased in 40 markets, and stayed the same in 105 markets.[14]

8. Focusing on markets that saw the largest changes in the ratio of homes passed to television households by a single MSO:

- Comcast with AT&T Broadband had 23 markets with an increase of at least 20 percentage points and only 16 with a decrease of at least that magnitude.

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[9] Four cases: TW2003-20 Orlando, 199 Mankato; Comcast+AT&T2003-169 Missoula; TW2007-19 Orlando.

[10] Seven cases: TW2003-87 South Bend, 162 Gainesville; Comcast+AT&T2003-118 Fargo, 127 Yakima; TW2007-25 Indianapolis, 38 West Palm, 88 South Bend.

[11] Warren Publishing indicates that in 2003, Time Warner had three systems in the Jacksonville, Brunswick DMA. All three systems reported subscribers, but only two systems reported homes passed. As a result, we accounted for <u>more subscribers than homes passed</u>. In order to resolve this inconsistency in the data (Problem #3 - HP<Subs), we first applied Formula #2 to the DMA statistics. Application of the formula, however, also resulted in HP<Subs. Subsequently, the same result was obtained after application of Formula #3. This was the only DMA in which the data could not be resolved using the corrective methodology described herein..

[12] The earliest data available are for January 2003, six months after the adoption of the *2002 Extension Order*.

[13] Data limitations made it impossible to complete the calculation for two DMAs.

[14] Data limitations made it impossible to complete the calculation for five DMAs.

- Comcast without AT&T Broadband had 43 markets with an increase of at least 20 percentage points and two with a decrease of at least that magnitude.

- Time Warner had 18 markets with an increase of at least 20 percentage points and 14 with a decrease of at least that magnitude.

9. Focusing on markets in which the ratio of homes passed to total television households is the largest:

- The number of markets in which Comcast's share is 70 percent or more increased from 18 to 30 (with AT&T Broadband) and from seven to 30 (without AT&T Broadband).

- The number of markets in which Time Warner's share is 70 percent or more dropped from 24 to 23.

III. Analysis of Profitability of Withholding of Regional Programming

10. The "critical value" analysis is designed to examine the costs and benefits to a vertically integrated satellite cable programmer (VISCP) of withholding an RSN from non-cable MVPDs in the local market. This is sometimes referred to as the "cable only" distribution strategy. The critical value is the minimum share of subscribers to non-cable MVPDs in the market that would have to switch to cable in response to withholding in order to make the strategy profitable. The critical value calculations are based on current DMA market structure, specifically the shares of television households (TVHH) passed by Comcast and Time Warner, financial data for Comcast and Time Warner, and the 2006 average profile of RSNs (*i.e.*, average affiliation fees and network advertising revenues per subscriber per month).

11. The calculations are based on publicly-available data and are designed to establish that, under plausible conditions, it would be profitable for a VISCP to withhold a RSN from all non-cable MVPDs in the DMA. It is assumed that some share of non-cable MVPD subscribers would switch to cable in response to withholding and that these subscribers are in the same areas of the market served by the VISCP's cable affiliate and in areas served by other cable operators. Moreover, it is assumed that all TVHH in the market are passed by cable.[15] The homes passed data for Comcast and Time Warner are taken directly from the Warren Publishing database; it is assumed that all other TVHH are passed by other cable operators. The calculations also assume that, prior to withholding, all MVPD subscribers receive the RSN.

The following notation is used to define the critical value:

V	the critical value
TVHH	number of television households in the DMA
HPASSED	the number of TVHH in the DMA passed by the VISCP's cable affiliate
ADS	the share of TVHH in the DMA that subscribes to non-cable MVPDs

[15] This is a reasonable assumption. National data from Kagan Research LLC indicate that more than 100 percent of "occupied homes" are passed by cable. *See* NCTA 2007 Industry Overview, p. 7, http://i.ncta.com/ncta_com/PDFs/NCTA_Annual_Report_04.24.07.pdf (last visited August 14, 2007). The assumption that all TVHH are passed by cable was also made in the uniform price increase analysis in the *Adelphia Order*. *See Adelphia Order*, 21 FCC Rcd at 8347, Appendix D ¶ 22.

P	the monthly per-subscriber profit that the VISCP's cable affiliate earns on an additional subscriber (net of amortized set-top box ("STB") cost)
FEE	the monthly per-subscriber affiliation fee charged by the VISCP (prior to withholding)
AD	the monthly per-subscriber network advertising revenues earned by the RSN

12. The critical value is the share of non-cable MVPD subscribers that would switch to cable in response to withholding. It is calculated by comparing the losses and gains associated with withholding.

The loss from withholding is: (ADS*TVHH) * (AD + FEE). This is the total number of MVPD subscribers in the DMA that do *not* subscribe to cable multiplied by the loss per subscriber of advertising revenue and affiliate fee.

The gain from withholding is:

[V *(ADS*TVHH)] *
[((HPASSED/TVHH)*(P + AD)) + (1-(HPASSED/TVHH))* (AD + FEE)]

The expression on the first line is the number of non-cable MVPD subscribers who chose to switch to cable. The expression on the second line is the average gain to the VISCP and its cable affiliate per subscriber who switches. It is a weighted average of the gain from a subscriber who switches to the VISCP and its cable affiliate (marginal profits from a new subscriber plus regained network advertising revenue) and the gain from a subscriber who switches to another cable operator in the market (regained affiliate fee and network advertising revenue). In order for withholding to be profitable, gains have to be equal to or greater than losses. Setting the term for gains equal to the term for losses makes it possible to solve for V, the critical value. Specifically, the critical value is:

(AD + FEE)/((HPASSED/TVHH)* (P+AD)) + ((1-(HPASSED/TVHH)* (AD + FEE))[16]

13. As noted above, HPASSED data come from Warren Publishing.[17] TVHH figures by DMA are available from Nielsen.[18] Average RSN revenue profiles (AD and FEE) are available from Kagan Research LLC. For 2006, FEE was $1.44 and AD was $0.45.[19] The current analysis examines the profitability of withholding a regional network with this particular revenue profile and thus would apply to a network with some other type of content as long as the revenue profile is the same. Marginal profit per subscriber figures were compiled by FCC staff for two major vertically integrated MSOs—Time Warner and Comcast. In each case, average revenue per subscriber per month and average variable cost

[16] This formula is a modified version of the one used in the *Hughes Order*. *See Hughes Order*, 19 FCC Rcd at 643, Appendix D n.60.

[17] Warren Publishing, *CABLE: General Information-January 2003*; Warren Publishing, *CABLE: General Information-July 2007*.

[18] *See* U.S. TV Household Estimates – Ranked by Households, http://www.tvb.org/nav/build_frameset.asp (follow "Research Central" hyperlink; then follow "Market Track" hyperlink; then follow "U.S. TV Households by Market") (last visited Aug. 2, 2007).

[19] *See* Kagan Research LLC, *Media Sports Business* at 4 (March 30, 2007). The calculations also use the specific profile for Comcast SportsNet Philadelphia (AD is $0.40 and FEE is $1.97) from this source.

per subscriber per month were obtained from company public financial reports (Annual Report and Form 10K). For each company, an upper bound and a lower bound profit figure was computed. The upper bound figure is based on the assumption that those subscribers that switch to the VISCP's cable affiliate purchase voice, video, and data services in the same proportion as do the firm's existing video subscribers. The lower bound figure is based on the assumption that those subscribers that switch to the VISCP's cable affiliate purchase only video services, but in the same proportion as the firm's existing video subscribers.

14. The analysis requires the marginal profit when a cable operator acquires an additional customer due to the lack of programming on a competing MVPD. We use measures of the cable operator's average revenue per subscriber to estimate the additional revenue that the firm would gain. To estimate the cost of serving the additional customer, we use the cable operator's costs net of its infrastructure and other overhead costs since serving an additional customer would not require building additional cable plant or expanding the size of the operator's headquarters staff. The profit calculations are made for the year 2006. Year-end total revenues are derived from the 10-K or Annual Report.[20] From this, total expensed costs associated with the same year-end period (represented in the 10-K or Annual Report as either total "cost of revenues" or total "operating expenses.") are subtracted from Revenues.[21] This result, divided by the total number of subscribers served,[22] and then divided by 12 yields the marginal profit (gross of subscriber acquisition cost) per subscriber per month for the MSOs entire cable operation. The marginal profit per subscriber is closely related to the degree of competition within the MVPD market. As such, the results of the analysis will vary based upon the amount of competition. When competition is vigorous in the market, marginal profit per subscriber will be low and the incumbent cable operator will be less likely to find it profitable to withhold programming. When competition in the MVPD market is weak, marginal profit per subscriber will be high and it will generally be profitable to withhold programming. Accordingly, the calculation incorporates the current degree of competition in the MVPD market. One empirical indicator of the degree of competition is the cable share of MVPD households.

15. The lower bound of the marginal profit estimate is derived from a calculation of marginal profit based on the revenues generated by the video services provided by the MSO. This assumes that new subscribers never purchase voice and data services, and purchase video services in the same proportion as existing customers. Segmented revenues figures are commonly broken out by cable MSO's in the "Segment Operating Results" section of the 10-K or Annual Report.[23] The elements of video-related revenues typically consist of subscription revenues and advertising revenues.[24] Since operating expenses are typically not broken out by type of service (or at least not all of the elements of operating expenses), a proportional rate must be derived from total revenues and total expenses to approximate the video portion of operating expenses. Depending on the method of reporting employed by each MSO, the application of the proportion is in some instances applied to the total operating expenses. In instances

[20] Comcast, Annual Report for the Year Ended Dec. 31, 2006, at 28 ("*Comcast 2006 Annual Report*"). Time Warner, Form 10-K for the Year-Ended Dec. 31, 2006, at 101 ("*Time Warner 2006 10-K*").

[21] *Comcast 2006 Annual Report* at 28; at 101. The cost category "Sales General & Administrative" is not subtracted from Revenues because these expenses apply to the entire corporation and cannot be matched with a particular service or group of subscribers.

[22] *Comcast 2006 Annual Report* at 29; *Time Warner 2006 10-K* at 71, 76.

[23] *Comcast 2006 Annual Report* at 28; *Time Warner 2006 10-K* at 71, 76.

[24] *Comcast 2006 Annual Report* at 28. *Time Warner 2006 10-K* at 71, 76.

where specific video-related costs (*e.g.*, programming costs) are broken out by the MSO, the proportion is simply applied to the other categories of expenses that that are not easily segmented across video and data services.[25] Subtracting a proportional estimate of operating expenses from video-related revenues and dividing by total subscribers served[26] and by 12 yields an estimate of marginal profit per subscriber per month (gross of subscriber acquisition cost)for the video-related services of the entire corporation.

16. In order to conduct the critical value analysis, it is necessary to compute marginal profit net of amortized subscriber acquisition costs. The data on subscriber acquisition costs come from an analyst report on Comcast.[27] The report assumes that each new subscriber requires two digital set-top boxes and that those who subscribe to advanced digital services (*i.e.*, HD and/or DVR) have one advanced and one standard set-top box. The report assigns a cost of $400 to advanced set-top boxes and a cost of $120 to standard set-top boxes. The report estimates that $45 per new subscriber of installation costs is amortized. It provides a weighted average subscriber acquisition cost of $278 and an average subscriber life of 45 months over which to amortize subscriber acquisition costs.[28] The calculations assume a discount rate of 10 percent.[29] The monthly per-subscriber profit that the VISCP's cable affiliate earns on an additional subscriber (net of amortized STB cost) is calculated as average revenue per subscriber per month less average variable cost per subscriber per month less monthly amortized subscriber acquisition cost.[30]

17. Critical value calculations are made for every DMA in which either Comcast or Time Warner had subscribers as of 2007. The results will vary with the share of homes passed by the VISCP's cable affiliate. If the percentage of homes passed is very low, then a high percentage of subscribers would need to shift in order to make withholding of the prototype network profitable. When the percentage of homes passed is very high, then a lower percentage of subscribers would need to shift in order to make withholding of the prototype network profitable. In order to decide on plausible critical values, we examine the most prominent example of RSN withholding, Comcast SportsNet Philadelphia. Using the average RSN revenue profile and Comcast's value for HPASSED/TVHH in the Philadelphia DMA, the critical values for Philadelphia (where we know that withholding is profitable) are 5.45% for

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[25] *Comcast 2006 Annual Report* at 28. *Time Warner 2006 10-K* at 71, 76. As with the upper bound calculation, the cost category "Sales General &Administrative" are not part of the calculation for the lower bound.

[26] *Comcast 2006 Annual Report* at 29; *Time Warner 2006 10-K* at 71, 76.

[27] *See* Bear Stearns, *Comcast Corp.: Reframing the 'CAPEX Issue:' 2Q07 Preview* (July 19, 2007), Exhibit 4 and associated notes ("*Bear Stearns Report*").

[28] The analyst report combines the data used herein with a figure it calls "Scalable Infrastructure CAPEX" and other data to calculate internal rates of return. As noted in note 9 to the report, they indicate that this figure is not necessarily a variable cost. They include it in their calculations for their purposes, but it is not included in the current subscriber acquisition cost calculations.

[29] *See Hughes Order*, 19 FCC Rcd at 635, Appendix D, ¶ 4.

[30] In the absence of a separate source for Time Warner's subscriber acquisition costs, we use the Comcast figures for Time Warner as well. It should also be noted that the subscriber acquisition costs are based on a weighted average across all (Comcast) subscribers. This is exactly what is needed for the upper bound profitability calculations, which assume that new subscribers switching to the VISCP's cable affiliate purchase voice, video, and data services in the same proportion as existing subscribers. It is not ideal for the lower bound calculations, but data were not available to disaggregate the video subscribers from the total to make a separate estimate of subscriber acquisition costs for video subscribers only. *See Bear Stearns Report*. The fact that, of the two non-video categories, one has a subscriber acquisition cost below the weighted average and one above suggests that using the weighted average is not unreasonable, although it may be slightly low for the lower bound profitability calculations.

the upper bound profitability and 8.40% for the lower bound profitability. We calculate the minimum amount of switching that must occur for the withholding of Comcast SportsNet Philadelphia to be a profitable endeavor for Comcast. This calculation uses the high and low estimates for the marginal profit earned by Comcast and the actual 2006 revenue profile of Comcast SportsNet Philadelphia. If Comcast's marginal profit is high, then at least 6.81% of competing MVPDs customers must have switched to Comcast for the withholding to be profitable. If Comcast's marginal profit is low, then at least 10.49% of competing MVPDs customers must have switched to Comcast for the withholding to be profitable. This gives us a range of the minimum subscriber shifts that must be occurring in Philadelphia for the endeavor to be profitable. This is an estimate of the critical value in Philadelphia in regards to Comcast SportsNet.

18. Applying these cutoff values for V to the calculated switching values yields the following results. For Comcast, using the average RSN profile, withholding would be profitable in 26 DMAs.[31] These are the DMAs in which Comcast's share of TVHH passed is greater than 73.7%; 13 of the 26 are among the top 50 DMAs in size. Using the Comcast SportsNet Philadelphia profile, withholding would be profitable in an additional 13 DMAs, of which 8 are in the top 50.[32] At this threshold, the Comcast share of TVHH passed is at least 60.4%.

19. With regard to Time Warner, it is appropriate to apply the cutoffs derived from the upper bound profitability calculations to the upper bound calculated critical values and the cutoffs derived from the lower bound profitability calculations to the lower bound critical values, since the upper and lower bound calculations embody different assumptions about the behavior of those who switch to cable. For the upper bound calculations, there are five DMAs in which it would be profitable for Time Warner to withhold an RSN of average revenue profile using the lower (5.46%) criterion and an additional 15 DMAs using the higher (6.83%) criterion.[33] Seven of the 20 DMAs in question are among the top 50. For the lower bound Time Warner calculations, there are no markets in which withholding would be profitable using the lower (8.44%) criterion and 13 DMAs in which withholding would be profitable using the upper (10.54%) criterion. Four of the 13 are in the top 50 DMAs.

20. *Conclusion*. The critical value calculations are forward-looking in nature. Although based on imperfect data, they nonetheless provide a basis for concluding that, absent the program access exclusivity prohibition, withholding of a RSN (or any other regional network with similar revenue profile) would be profitable in a significant number of DMAs. The calculations suggest that if, through clustering, Time Warner, Comcast, or any other VISCP attained a sufficiently high share of television households passed by its cable systems in a particular DMA, withholding could be profitable there as well.

IV. Analysis of Profitability of Withholding of National Programming

21. It is also possible to calculate the minimum fraction of non-cable subscribers that must shift to cable in order to make withholding profitable. The method used to calculate these critical values is the same as that for regional programming, and the profitability estimates used are the same. The Warren data permit us to calculate the national share of cable homes passed by Comcast (34.08%) and Time Warner (21.89%). We retain the assumption that all homes nationwide are passed by cable. Data

[31] The data indicates that Comcast provides service to at least part of 97 DMAs.

[32] The nature of the critical value formula is such that, for Comcast, any market that meets a cutoff for the upper bound profitability level would also meet it for the lower bound profitability level.

[33] The data indicates that Time Warner provides service to at least part of 89 DMAs.

on affiliation fees and network advertising revenue per subscriber per month are available from Kagan Research LLC.[34] Calculations were made for 11 popular networks, on the assumption that they were owned by Comcast or by Time Warner. For Comcast, the critical values of the 11 networks ranged from 1.9 to 28.3 percent for the upper bound profitability scenario and from 3 to 40 percent for the lower bound profitability scenario. For Time Warner, the upper bound profitability scenario critical value range was 3.9 to 45.8 percent, while the lower bound profitability scenario critical value range was 6.7 to 63.6 percent for the 11 networks.

[34] Kagan Research, LLC. *Economics of Basic Cable Networks 2007*, at 36-40, 60-62, 80-82; Kagan Research, LLC, Media Trends 2006, at 66-67; Kagan Research LLC, *Cable Program Investor*, Jun. 29, 2007, at 10.

APPENDIX D

Revised Rules

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 76 — MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Section 76.1002 is amended by revising paragraph (c)(6) to read as follows:

§76.1002 Specific Unfair Practices Prohibited.

* * * * *

(c) ***

(6) **Sunset provision.** The prohibition of exclusive contracts set forth in paragraph (c)(2) of this section shall cease to be effective on October 5, 2012, unless the Commission finds, during a proceeding to be conducted during the year preceding such date, that said prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

3. Section 76.1003 is amended by adding a sentence to the end of paragraph (e)(1) and by adding paragraphs (i), (j) and (k) to read as follows:

§76.1003 Program access proceedings.

* * * * *

(e) *Answer.* (1) * * * To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.

* * * * *

(i) *Alternative dispute resolution.* Within 20 days of the close of the pleading cycle, the parties to the program access dispute may voluntarily engage in alternative dispute resolution, including commercial arbitration. The Commission will suspend action on the complaint if both parties agree to use alternative dispute resolution.

35

(j) *Discovery*. In addition to the general pleading and discovery rules contained in § 76.7 of this part, parties to a program access complaint may serve requests for discovery directly on opposing parties, and file a copy of the request with the Commission. The respondent shall have the opportunity to object to any request for documents that are not in its control or relevant to the dispute. Such request shall be heard, and determination made, by the Commission. Until the objection is ruled upon, the obligation to produce the disputed material is suspended. Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection as described above, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the complaint may be dismissed with prejudice.

(k) *Protective Orders*. In addition to the procedures contained in § 76.9 of this part related to the protection of confidential material, the Commission may issue orders to protect the confidentiality of proprietary information required to be produced for resolution of program access complaints. A protective order constitutes both an order of the Commission and an agreement between the party executing the protective order declaration and the party submitting the protected material. The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings.